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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 98

SARAH PRINCE, *Appellant*

v.

COMMONWEALTH OF MASSACHUSETTS

APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS
FOR THE COUNTY OF PLYMOUTH

APPELLANT'S REPLY BRIEF

HAYDEN C. COVINGTON
ALFRED A. ALBERT

Counsel for Appellant

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MAY IT PLEASE THE COURT:

The shelter, appellee's brief, in which are entertained some astonishing and strange conclusions of law, has a superstructure of syllogistic subtleties held together by logistical legerdemain, all of which rest upon a foundation of false premises. This sort of structure can never withstand the storm of judicial scrutiny which brings with it the flood waters of justice and the fierce winds of common sense. With the collapse of that structure in the first gust of fundamentals and reason, those wishful conclusions blow away.

The foundation of that structure is: the trial court concluded that whether the appellant and the child were engaged in acts of preaching and worship of Jehovah God at the time and place in question was not material; and that the trial judge inferentially found that they were not thus engaged by his refusing appellant's request for ruling number four. (R. 9-10) This conclusion of the trial court is contrary to the undisputed evidence and is unsupported by any testimony. The contention by appellant and the girl that they were worshiping Almighty God is not disputed or denied by any witness. The trial court's finding distorts the record and substitutes a private opinion obtained from a source other than the record. The appellee's contention was anticipated and answered in appellant's main brief. (Br. p. 35) The conclusion or finding is not binding upon this Court and can be rejected for the reasons stated in the main brief. (Br. p. 35, and *passim*)

A large part of appellee's structure is that the doctrine of *parens patriae* is the supreme power within the Commonwealth, concerning the conduct of children brought within the pale of a statute having relation to a purpose which the state is entitled to protect. This contention of *supremacy* is maintained regardless of the facts to which the statute is applied. A large part of the superstructure is that the sacred right to instruct the child in the Bible and permit

it to discharge obligations suitable to its conscience by distribution of Bible literature is only a *natural right* which is not secured by the First Amendment. The Commonwealth has built this up to the point that the so-called *natural right* of the appellant to educate and rear the child, protected by the Fourteenth Amendment, is severed from the fundamental right of freedom of worship secured to her and the child under the First Amendment. This part of appellee's argument falls away when it appears that the rearing and education of Betty Simmons by appellant concerns her obligations to Almighty God, which homogeneous mixture makes it impossible to split the two rights in this case.

Massachusetts fails to tie together the parts of the argument by discharging the burden placed upon it to prove by satisfactory evidence an abuse of parental control, and a clear and present danger of substantial injury to the child from her conduct, as a condition precedent to sustaining the conviction and satisfying the demands of the First Amendment. The necessity to show abuse by the parent of the prerogative concerning the child before invoking *parens patriae* is entirely ignored by the Commonwealth as is the requirement to show that the particular facts of the case do not involve rights secured under the First and Fourteenth Amendments.

The opinions rendered in the cases cited by appellee and relied upon by it do not control here and do not support its invoking the doctrine of *parens patriae*. In those cases there was not involved an activity or the exercise of a right protected by the First Amendment; but the cases involved instances of commercial exploitation of children in gainful labor within the competency of the state to prohibit. The authority of the state to intervene through *parens patriae* and proceed against the parent or guardian is contingent upon a severance of the relationship of parent and child by an abuse and serious injury to the child when it is shown that the activity is protected by the Constitution. No such showing is made here.

The cases concerning failure to furnish medical attention to an ill child, employment of child in hazardous industries or in jobs that are clearly shown to be dangerous and imperil the life, limb and health of the child do not apply or control to a situation of the kind involved here. Those cases deal with the *abuse*, or plainly revealed a clear and present danger of some injury that can be prevented by the state. It is unnecessary to discuss the many cases of this kind relied upon by appellee. They are not in point.

The specious argument of the appellee advocating the adoption of Spartan totalitarian principles by the premature and unjustified exercise of *parens patriae* over the

child is rejected in *Meyer* v. *Nebraska*, 262 U. S. 390, at pages 401-402.

Again in *Pierce* v. *Society of Sisters*, 268 U. S. 510, at page 535, it was plainly stated that in the realm of religious training of children parents could not be penalized by statute, and the child was not a creature of the state.

In the field of *natural rights* of the parent where no activity secured by the First Amendment was involved the state has been denied the authority to intervene in the absence of abuse of the child by a parent. *Skinner* v. *Oklahoma*, infra; *Pierce* v. *Society of Sisters*, supra; *Meyer* v. *Nebraska*, supra. A scholarly discussion of the law and an exhaustive review of the decisions on this particular point were made by the Supreme Court of Washington in the case styled *In re Hudson*, 126 P. 2d 765, 777, 13 Wash. 2d 673, 685-707. It would be helpful to read that opinion.

Even if it is assumed *arguendo* that the doctrine of *parens patriae* overcomes the "natural right" of appellant to have custody and control of her minor charge, the doctrine encounters a much stronger and more serious obstacle. When this doctrine is misapplied to the facts and circumstances of this case, it comes into square collision with the express provisions of the First Amendment guaranteeing *freedom of worship*. This guarded constitutional right is much stronger and weightier than the right

of the state under the doctrine of *parens patriae*. The record shows that the activity is protected by the First Amendment. This cannot be gainsaid by an attempt to hide behind factitious conclusions of the trial court. (See appellant's main brief, page 35.)

By resort to the shield of the First Amendment, on which she has a firm and unshakable grasp, the appellant is protected by a presumption of unconstitutionality of the application of the statute which arises to throw back the criminal sanctions provisions of the statute imposed upon Sarah Prince. (See appellant's main brief, pages 22-23.)

Before appellee can apply the penalty of the statute to the appellant for her conduct it must first show to the satisfaction of this Court that it has discharged its burden by overcoming the presumption of unconstitutionality. The Commonwealth must establish from the particular facts of record an abuse of the prerogatives of the appellant by showing that some real, substantial and serious injury will be suffered by the child by permitting it to preach the gospel with appellant in the forum of the public streets. There is no claim of any such injury. No evidence was introduced by Massachusetts to show such peril to the child. The undisputed evidence fails to show any injury real or imaginary, present or future, that might come to the child. The child was in no greater peril than were the children on the

streets at the time who accompanied their parents shopping or to the theater, etc. Consider the remarks of Chief Justice Allen in *State* v. *Richardson*, — N. H. —, 27 A. 2d 94. It is now well established by this Court that the burden of proof is upon those who would restrict activity of the sort here involved to justify by evidence the infringement. Appellee having failed to offer any proof, the conviction must be reversed.

An extensive hypercritical argument is pursued by the Commonwealth, that the *natural rights* of the parents to raise children, direct their education and generally control the affairs of the minor are not connected with the freedom of worship. It needs no argument to establish that the activity of Jehovah's witnesses in preaching the gospel according to the dictates of their conscience is secured by the First and Fourteenth Amendments to the Constitution.

It is manifest, as heretofore stated, that the natural right is so entwined with the right of worship and the act of preaching that they cannot be segregated by any reasonable or lawful process. But even if it be found that only a *natural* right is involved, there is not a sufficient showing of a reasonable connection between the means employed and the ends aimed for in the facts shown in the record. Neither the right of free speech nor freedom of religion guaranteed by the First Amendment were involved, invoked or relied

upon in *Meyer* v. *Nebraska,* supra, *Pierce* v. *Society of Sisters,* supra, and *Skinner* v. *Oklahoma,* 316 U. S. 535; nevertheless the *due process* and *equal protection* clauses of the Fourteenth Amendment were strong enough to kick off the infringements in those cases. Such cases cannot be distinguished from the principle which appellant contends must be applied to the facts here. Even where the First Amendment cannot be invoked to raise a presumption of unconstitutionality or to throw back the presumption of validity of statutes, it is nevertheless the duty of the prosecution to establish in the evidence a clear and present danger of immediate injury. (See main brief, pages 24-26.) This the appellee has failed to do, and the record shows no clear and present danger of serious injury.

If this conviction is affirmed it means that upon the same record under the law of Massachusetts the custody of the child could be taken away from appellant and Betty Simmons be placed in a county training school. It is submitted that upon the record and law the judgments of the courts below should be reversed and the complaints ordered dismissed.

HAYDEN C. COVINGTON
ALFRED A. ALBERT
Counsel for Appellant